MAYBAN FINANCE BHD.

v.

BUMINO SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D3-23-1962-87]
27 MARCH 1992

BANKING: *Equipment leasing by a finance company in 1985 - Whether this activity comes within the ambit of a "borrowing business" or a "borrowing company" as defined in the Finance Companies Act 1969 - The legality of the transaction when carried out by a finance company - The repeal of the said Act - Saving provisions.*

CIVIL PROCEDURE: *Delay of eight months in applying for summary judgment - Absence of affidavit explaining delay - May Court nevertheless decide in favour of summary judgment? - Appeal - Raising of points not pleaded in pleadings or affidavit.*

WORDS AND PHRASES: *Definitions - "Borrowing business" and "borrowing company" - Finance Companies Act 1969.*

The plaintiff, a finance company, had by an agreement dated 25 September 1985 leased certain equipment to the first defendant company. The other defendants stood as guarantors to the lessee. There were defaults in payment, the agreement was repudiated and thereafter terminated by the plaintiff who claimed sums due from all the defendants by way of summary judgment.

The third defendant now appeals against the decision of the Senior Assistant Registrar given on 18 October 1988 allowing the plaintiff to enter final judgment against the third defendant. Counsel raised several points against the plaintiff's claim. However, only two were considered by the learned Judge in view of the fact that the other points had not been pleaded in the defence.

The two points considered were:

(i) Whether the Court may enter an order 14 judgment even though the application was filed late with a delay of some eight months, and

(ii) Whether the leasing agreement is *void ab initio* when scrutinized in the context of the provisions relating to licensed borrowing companies as contained in the Finance Companies Act 1969.

Held:

[1] Although there was a delay in applying for summary judgment and although no affidavit was put in Court explaining the reason for the delay, the Court could still exercise its discretion and look into the merits of the application.

[2] The issue of the illegality of the transaction may be raised even though not pleaded.

[3] The transaction entered into was clearly a leasing transaction which is not within the ambit of the business of a finance company as defined by ss. 2 & 4 of the Finance Companies Act 1969 (repealed by the Banking and Financial Institutions Act 1989, s. 128 of the same contains saving provisions as regards decisions etc. relating to the FCA 1969).

[4] In view of the above, it appears that this was not a proper case for summary judgment.

[Appeal dismissed with costs.]

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 128
Finance Companies Act 1969, ss. 2, 4, 43, 49

Other source referred to:
Mallal, Supreme Court Practice, 2nd Edn., p. 193

For the plaintiff - W. Kraal; M/s. Paul Chong & Kraal
For the defendant - Yeap Eng Kheng; M/s. Yeap Eng Kheng & Co.

JUDGMENT

Zakaria Yatim J:

This was an appeal by the third defendant against the decision of the Senior Assistant Registrar given on 8 October 1988 ordering that the plaintiff be at liberty to enter final judgment against the third defendant.

By an equipment lease agreement dated 25 September 1985, the plaintiff, at the request of the first defendant agreed to purchase a number of equipments for the purpose of leasing the same to the first defendant for a period of 36 months payable by monthly rentals of RM7,045 commencing on 25 September 1985. Under the terms of the agreement the first defendant agreed as follows:

(a) to punctually pay all amounts of rentals payable under the agreement.

(b) time was the essence of the agreement.

(c) to keep the equipments at all times in the possession and control of the first defendant.

(d) late charges on any payment overdue at the rate of 18% per annum calculated on a daily basis.

The first defendant further agreed that should it be in default of payment of any of the sums due under the agreement or in default of performance or observance of the terms and conditions contained in the agreement, the plaintiff would immediately terminate the agreement without notice and resume possession of the said equipments. Upon termination of the agreement the first defendant would *inter alia* pay to the plaintiff arrears of rentals accrued as at the date of termination and any expenses incurred by the plaintiff in recovering possession of the equipments.

By an agreement in writing dated 25 September 1985, the second, third, fourth, fifth, sixth and seventh defendants guaranteed payment by the first defendant of all sums due under the said equipment lease agreement as well as the due observance and performance by the first defendant of the terms and conditions expressed or implied in the agreement. The second to the seventh defendants also agreed to indemnify the plaintiff against any loss or damage costs and expenses which the plaintiff might sustain.

The first defendant defaulted in payment and thereby repudiated the lease agreement. The plaintiff's claim against the first defendant was for the sum of RM325,379.17 being damages suffered by the plaintiff as a result of the first defendant's repudiation of the lease agreement.

By a letter dated 7 April 1987, the plaintiff through its solicitors accepted the first defendant's repudiation of the lease agreement and terminated it forthwith and demanded payment from the first defendant the sum of RM325,379.17.

By another letter dated 7 April 1987 the plaintiff, through its solicitors demanded payment from the second to the seventh defendants as guarantors for the said sum. No payment was made by any of the defendants.

The defence filed by the third defendant (enclosure 6) was a bare denial.

At the hearing of the appeal, Mr. Yeap, Counsel for the third defendant, raised a number of points.

The first point was that there was a delay of eight months in filing the application for summary judgment. Mr. Yeap said that the plaintiff had not filed an affidavit to explain the delay. In his affidavit in reply (enclosure 23A) the third defendant did not raise the question of delay. In any event if there was a delay, the Court could still go into the merits of the application.

The second point raised by Mr. Yeap was that the defendant had not received the letter of demand. This point was not raised in the affidavit or in the statement of defence of the third defendant. It would not be proper for this Court, therefore, to consider this point.

The third point raised was that the lease agreement exhibited to enclosure 9 was not executed by the third defendant. This point was irrelevant because the third defendant signed a separate agreement as one of the guarantors. In any event this point had not been pleaded in the third defendant's defence.

The fourth point raised by Mr. Yeap was in respect of the letter of offer by the plaintiff. He contended that the terms and conditions were not met. This point, too was not stated in the third defendant's affidavit or in his defence.

The last point raised by Mr. Yeap was that the said leasing agreement was not a borrowing business within the meaning of the Finance Companies Act 1969 and therefore the leasing agreement was *void ab initio*. He contended that it was illegal for the plaintiff, a finance company to carry out a leasing business.

Mr. Kraal, Counsel for the plaintiff said that this last point was not pleaded in the third defendant's defence or in the third defendant's affidavit. He said he was "unprepared for that point."

Therefore, at the hearing of the appeal this last point was not fully argued before me by both parties.

While writing these grounds, I have the opportunity to examine the relevant provisions of the Finance Companies Act as well as the evidence in this case.

In para. 1 of the statement of claim, the plaintiff stated that it was a licenced finance company incorporated in Malaysia and having its place of business at 16-18, Medan Pasar, Kuala Lumpur. Section 4 of the Finance Companies Act provides that "a licenced borrowing company shall not carry on any kind of business other than "borrowing business." The term "borrowing business" is defined in s. 2 as follows:

> (a) the acceptance of any money on deposit or loan by a person (in this definition referred to as 'the borrower') from more than ten persons wherein the borrower is under a liability (whether or not such liability is present or future) to repay the money to these persons; and
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> (b) (i) the lending; or
>
> (ii) the investment,
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> by the borrower, his agents or his servants (and if the borrower is a company, including its wholly-owned subsidiaries) of the borrower's funds;

Under the same section, "a borrowing company" means a company which carries on borrowing business. Section 49 of the Act states:

> 49. The provisions of this Act shall be without prejudice to the provisions of the Companies Act 1965, but where there is a conflict between that Act and this Act the provisions of this Act shall prevail (unless this Act otherwise provides) with regard to borrowing business.

Under s. 43 of the Act, any person who contravenes any of the provision of the Act is guilty of an offence.

The transaction carried out by the plaintiff in the present case was the leasing of equipment. The preamble of the equipment lease agreement clearly states:

> An Agreement made 25 September 1985, between **Malayan Finance Corpn. Bhd.** of 16-18, Medan Pasar, Kuala Lumpur (hereinafter with its successors and assigns referred to as **'the Lessor')** of the one part and the **person or company** whose name and address is set out in the Schedule hereto (hereinafter referred to as **'the Lessee**) of the other part.
>
> Whereas at the request of the Lessee **the lessor** if it does not already own them has agreed to purchase the goods described in the Schedule hereto (hereinafter referred to as 'the goods' **for the sole purpose of leasing the goods to the Lessee Upon** and subject to the terms and conditions herein contained.
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> (Emphasis added)

Although the Finance Companies Act was repealed by the Banking and Financial Institutions Act 1989, s. 128 of the new Act contains saving provisions.

Mr. Yeap alleged that the leasing business carried out by the plaintiff was illegal. In my opinion, Mr. Yeap was entitled to raise this issue even though it was not pleaded in the defence. According to *Mallal's Supreme Court Practice*, 2nd Edn. at p. 193, "where a contract or transaction is, on its face, illegal, the defendant may take the objection, though he has not pleaded it ..."

In view of the last point raised by Mr. Yeap, it appears that this was not a proper case for summary judgment.

But I had earlier dismissed the third defendant's appeal with costs and gave judgment for the plaintiff against the third defendant.

In view of the provisions contained in the Finance Companies Act I am now doubtful whether I had made this right decision in this case.

Also found at [1992] 3 CLJ 1728